

**DENTAL BUREAU OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: March 25, 2009

Subject Matter of Proposed Regulations: Disciplinary Guidelines

Section(s) Affected: Title 16, Division 10, California Code of Regulation, Section 1018

Specific Purpose of each adoption, amendment, or repeal:

The Dental Bureau of California proposes to amend Section 1018 of Division 10 of Title 16 of the California Code of Regulations. The purpose for amending the regulation is to update the Disciplinary Guidelines that are incorporated by reference in section 1018 and revise the “Board of Dental Examiners Disciplinary Guidelines with Model Language”, last revised in 1996.

The Bureau uses disciplinary guidelines when taking action to suspend, revoke, or place a license on probation. The proposed changes to the Disciplinary Guidelines are necessary to incorporate numerous statutory and regulatory changes that have occurred in dental law since the last revision in 1996, to ensure the consistent use of titles and terms between Disciplinary Guidelines and the Dental Practice Act, to remove outdated and unnecessary terms and conditions of probation and to incorporate new changes necessary to ensure the Bureau’s ability to meet its consumer protection mandate.

A summary of the proposed changes is below. Please note that the term “Bureau” is used in the Initial Statement of Reasons, but the actual Disciplinary Guidelines use the term “Board” because the agency will once again become a Board on January 1, 2009.

TITLE PAGE

Replace “Board of Dental Examiners” with “Dental Board of California”.

Update the revision date.

Add the Dental Board of California’s contact information including address and phone numbers.

INTRODUCTION

Deletion of the original introduction and the insertion a new introduction are proposed to provide clarification and allow for easier reading and consistency.

FACTORS TO BE CONSIDERED

This language specifies the factors the Bureau has determined should be considered when either the administrative law judge or the board members are considering the appropriate penalty.

OTHER SITUATIONS IN WHICH REVOCATION IS THE RECOMMENDED PENALTY

This language provides direction to administrative law judges and board members as to situations where revocation is the appropriate penalty.

PROBATION TERMS AND CONDITIONS

Language has been added providing a list of standard and additional probationary terms and conditions to provide for a user-friendly document.

MODEL INTRODUCTORY LANGUAGE TO BE USED FOR ALL PROBATIONARY ORDERS

This language provides model language so that there is consistency and accuracy in decisions reflective of what type of license or permit is being disciplined.

STANDARD PROBATION CONDITIONS FOR ALL DECISIONS AND ORDERS

This language provides amendments to the standard conditions that should be in all decisions and orders

Severability Clause: The severability clause is necessary in the event any other provision is declared unenforceable to avoid the possibility of all probation conditions being invalidated upon a successful appeal.

The following provides the necessity for each probation condition and term:

(1) Obey all Laws: All licensees are responsible for abiding by federal, state, and local laws. Licensees are also responsible for complying with criminal court orders. If a licensee is subject to other health-care related board or regulatory agency orders, violations of those orders may impact the status of his or her discipline by the Board. This condition emphasizes the Respondent's responsibility and specifies the Board's authority to take more immediate and severe action if other violations occur. If a licensee whose license is on probation violates other probationary conditions or order they may be unsafe to practice in this state.

(2) Quarterly Reports: This provides the Board with a mechanism for maintaining communication with the Respondents between meetings; gathering pertinent information from Respondent's; obtaining written materials, other than routine reports, that might be deemed necessary on an individual basis. This also allows coordination with other state agencies that discipline dentists and dental auxiliaries.

(3) Comply with the Board's Probation Program: The provision is necessary to ensure that licensees whose licenses are on probation are in full compliance with conditions of probation in order to demonstrate a Respondent's commitment to rehabilitation and to correcting the problems which led to the disciplinary action.

(4) Address Change, Name Change, License Status: Informing the Board of address and name changes is necessary to ensure ongoing Board monitoring and contact with the Respondent.

(5) Meetings and Interviews: This provides a means for the Board representatives to make periodic assessments of the Respondent, to determine compliance with probation conditions and to give guidance and directions to licensees on probation.

(6) Status of Residency, Practice, or Licensure Outside of State: This ensures that Respondents may not complete probation without being fully monitored for their period of probation in California. This further ensures that the Board is aware of all licensure outside of California as a dentist or dental auxiliary or in any health care related capacity.

(7) Submit Documentation: This provides the Board with a mechanism for maintaining communication with the Respondent between meetings; gathering pertinent information from the Respondent; and obtaining written materials, other than routine reports, that might be deemed necessary on an individual basis.

(8) Cost Recovery: The Board has statutory authority to collect probation monitoring costs and all orders should contain this provision.

(9) Probation Monitoring Costs: The Board has statutory authority to collect probation monitoring costs and all orders should contain this provision.

(10) License Surrender: This provision is necessary in the event a licensee wishes to surrender his or her license. However, it is written so that the Bureau retains its authority to refuse to allow a surrender in the event the licensee has committed additional violations and the Bureau wishes to pursue another administrative action.

(11) Function as a Licensee: This provides the Board with an opportunity to monitor Respondents and determine if they can perform the functions and duties of his or her licensing category in a competent manner. It also prevents Respondents from merely “sitting out” the probation and avoiding the necessity of demonstrating competence and compliance with probation conditions.

(12) Continuance of Probationary Term/Completion of Probation: The provision ensures that the Board will be able to continue monitoring the practice of licensees who are either out of compliance with his or her probation conditions or have allegedly committed further acts that constitute a violation of the Dental Practice Act. This is necessary to protect the public from licensees who have already demonstrated a lack of compliance.

(13) Sale or Closure of an Office or Practice: This provision is intended to protect patients whose dentist of record has been disciplined and he or she needs to or chooses to sell or close his or her practice.

(14) Notification: The condition provides the Board with a mechanism for ensuring that the employer providing dental services is informed of the license status of the respondent so that, if necessary, the work environment can be structured to ensure consumer safety.

ADDITIONAL CONDITIONS OF PROBATION MODEL LANGUAGE

This language contains clarifying amendments as well as additional terms that have been added.

(15) Suspension: This provision is necessary for the protection of the public because in some cases the licensee needs to stop practicing and participate in either rehabilitation or remedial education before resuming practice. And, it is appropriate in cases where the serious nature of the misconduct warrants a period of suspension from practice.

(16) Remedial Education: In those instances where a licensee has demonstrated negligence or incompetence, or has been found to have performed work or attempting treatment beyond the scope of training or experience, the Board will impose a program of remedial education. This program shall specify the areas and hours of education remediation required, and may also dictate the institution(s) where the education will be received. A remedial education program is usually required prior to allowing the licensee to return to the identified deficient area of practice, and requires prior approval by the Board. Continuing education courses used for renewal of licensure will not fulfill the remedial education requirement. This program is for dentists and auxiliaries who have demonstrated deficiencies in skill but do not constitute a present danger to patients in other areas of practice.

(17) Examination: This condition concerns itself with those individuals who are significantly deficient in the practice of dentistry or who have had a prior revocation and are petitioning the Board for reinstatement of their license. This condition will also apply to licensees who have had prior restrictions on practicing in a particular area or specialty field. This condition is particularly recommended in cases where Respondent has been found to have committed gross negligence, incompetence or repeated negligence.

(18) Supervised Practice: This condition allows the Board to monitor the competency of Respondent by use of a fellow practitioner. It is most appropriate in those cases involving incompetence, negligence, and sexual misconduct. The type of supervision needs to be clearly defined relative to the necessity for the presence of the supervisor. Direct supervision would require the physical presence of the supervisor during the time dental procedures are performed. General supervision does not require the physical presence of the supervising dentist. The type of required supervision depends on the severity of the violation(s).

(19) Restricted Practice: The condition prevents the Respondent from engaging in the practice of dentistry in situations where there is no close supervision or where the

respondent could have undue authority over others and access to controlled substances.

(20) Third Party Chaperone Monitor: This condition should only be imposed in those rare instances where the Respondent's misconduct was not serious, Respondent has shown rehabilitation and Respondent has no other deficiencies.

(21) Restitution: Where there has been patient harm resulting from negligent or incompetent treatment or a determination has been made concerning fraudulent billing, restitution may be warranted. Careful scrutiny should be made to ensure that proper restitution is made to either the patient or any other applicable entity. Restitution may be made within a specific time frame or on a payment schedule. Restitution should cover those amounts that are a direct result of the actions of Respondent.

(22) Community Service: The Dental Practice Act authorizes the Board to impose as a condition of probation the fulfillment of community service. This is appropriate in those cases where the Respondent has violated the public's trust. If the violation relates to quality of care, the community service shall not be dentally related.

(23) Psychiatric or Psychological Evaluation: This condition shall be applied, but not limited to, any licensee who may be affected by a psychological problem, who has committed an act of sexual misconduct or who has suffered a substantially related conviction. This evaluation may be ordered and the results evaluated prior to allowing practice by the Respondent. This evaluation is necessary to ensure that the licensee is safe to practice in a monitored setting.

(24) Psychotherapy: This condition should be imposed whenever there is evidence that the Respondent may have a psychological problem that may impact his or her being able to practice safely. If the Respondent is already in therapy this condition should be imposed to ensure that he or she continues to receive help. This provision is necessary to ensure that the licensee is safe to practice in a monitored setting.

(25) Physical Evaluation: This condition shall be applied, but not limited to, any licensee whose ability to practice safely may be affected by a physical condition. This evaluation may be ordered and the results evaluated prior to allowing practice by the Respondent. This evaluation is necessary to ensure that the licensee is safe to practice in a monitored setting.

(26) Diversion Program: Where it has been determined that in order to protect the public, a licensee or applicant should be evaluated to determine if he or she should participate in the Board's Diversion Program due to drug or alcohol impairment, this condition of probation should be imposed.

(27) Biological Testing: This probation condition will allow the Board to monitor the Respondent whether the licensee is in compliance with an order to abstain from

controlled substances and alcohol. It is to be required when the Respondent has violated any alcohol and/or substance abuse prohibitions.

(28) Abstain from Use of Alcohol, Controlled Substances and Dangerous Drugs: Abstinence from mood altering substances (alcohol/drugs) is necessary for compliance with the Board's Probation Program and to ensure successful rehabilitation. Abstinence from any psychotropic drug is required to prevent the substitution of one addicting substance with another.

(29) Surrender/Partial Surrender of Drug Enforcement Agency Permit: In cases of substance abuse/or violation of statutes regulating the procurement, dispensing or administration of controlled substances and dangerous drugs, this condition must be imposed to order to restrict the licensee's prescribing authority until he or she is sufficiently rehabilitated.

(30) Ethics Course: In those cases involving fraud, false advertising, excessive billing, or negligence this condition of probation will be imposed and may also be imposed in other cases if applicable. This condition is necessary to ensure that licensees understand their ethical obligations in order to avoid additional violations of the Dental Practices Act.

(31) Billing Monitor: Recommended in cases involving capping, steering, fees for patient referrals or any other type of billing irregularities or fraud to allow the Bureau to monitor the licensee's billing practice to ensure compliance with the laws and regulations governing billing.

(32) Solo Practice: Like similar conditions, this condition prevents the respondent from engaging as a sole practitioner in the practice of dentistry in situations where there is no close supervision and/or where the respondent could have undue authority over others and/or access to controlled substances.

(33) Controlled Substance - Maintenance or Records and Inventories: In cases of substance abuse/or violation of statutes regulating the procurement, dispensing or administration of controlled substances and dangerous drugs, this condition must be imposed in order to provide the Bureau with a means to monitor the licensee's compliance with the laws and regulations governing controlled substances.

(34) Clinical Training Program: In those instances where a licensee has demonstrated serious negligence or incompetence, or has been found to have performed work or attempting treatment beyond the scope of training or experience, the Board will impose a program of clinical training. This program shall specify the areas and hours of clinical training required, and may also dictate the institution(s) where the education will be received. A clinical training program is usually required prior to allowing the licensee to return to the identified deficient area of practice, and requires prior approval by the Board. Continuing education courses used for renewal of licensure will not fulfill the clinical training requirement. This program is for dentists and auxiliaries who have

demonstrated deficiencies in skill but do not constitute a present danger to patients in other areas of practice.

RECOMMENDED PENALTIES:

The Bureau made the following changes to the recommended penalties:

- Included a specific listing of appropriate conditions and terms for each type of violation
- Included new violations that were not in the Dental Practice Act in 1996
- Included more specific recommendations for violations that could range from mild or quite serious depending on the specific facts in the case
- Made consistent penalties for similar offenses and
- Made other conforming changes

Factual Basis/Rationale

Business and Professions Code section 1614 generally authorizes the board to amend rules and regulations pertaining to the manner of issuance and reissuance of licenses and the administration and enforcement of Chapter 4, Division 2.

Business and Professions Code section 1670 authorizes the Board to take action against a licensee for unprofessional conduct as defined.

Business and Professions Code section 1680 defines unprofessional conduct by a person licensed under Chapter 4, Division 2.

Business and Professions Code section 1681 defines additional acts constituting unprofessional conduct by a person licensed under Chapter 4, Division 2.

Government Code Section 11400.20 authorizes the board to adopt regulations to govern an adjunctive proceeding.

Government Code Section 11425.50(e) prohibits a penalty from being based upon a guideline unless the guideline has been adopted as a regulation.

California Code of Regulations section 1018 incorporates by reference the Disciplinary Guidelines.

The Dental Bureau of California regulates the practice of dentistry and the protection of the public is the highest priority for in exercising its licensing, regulatory, and disciplinary functions. The Bureau conducts its own inspections and investigations of licensees and applicants.

The Disciplinary Guidelines are necessary to assist the board, deputy attorney generals and administrative law judges to identify and impose appropriate disciplinary action against a licensee or applicant who violates the laws governing the practice of dentistry.

The “Dental Board of California Disciplinary Guidelines with Model Language” is referenced in these amendments. It is sixty-three (63) pages in length and is available on the board’s website and from the board upon request. It would be cumbersome, unduly expensive and otherwise impractical to publish the documents in the California Code of Regulations.

Underlying Data

1. December 6, 2007 Disciplinary Guidelines Committee Meeting Minutes
2. August 28, 2008 Dental Bureau Advisory Committee Meeting Minutes
3. Medical Board’s Disciplinary Guidelines
4. Board of Registered Nursing Disciplinary Action

Business Impact

The Bureau does not believe that this regulation will have a significant adverse economic impact on businesses as it only affects individuals and those business that are disciplined for serious violations of the Dental Practice Act.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulation would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation each alternative was rejected. More specifically the Bureau considered not seeking a regulatory changes and determined that that alternative should be rejected because the Disciplinary Guidelines are extremely out-of-date. Many new laws have been enacted since 1996 that affect the practice of dentistry. In addition, it would be contrary to the Bureau’s public protection mandate to not include proposed changes designed to allow the Bureau better monitoring of licensees on probation with the Bureau.